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BRIEF FOR PLAINTIFF IN ERROR.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 143.

AUGUST G. REETZ, PLAINTIFF IN ERROR,

vs.

THE PEOPLE OF THE STATE OF MICHIGAN.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MICHIGAN.

(18,236)

WILLIAM P. BELDEN,
Attorney for Plaintiff in Error.

EDWIN A. BURLINGAME
and JESSE F. ORTON,
of Counsel.



THE

Supreme Court of the United States.

File No. 18,236, Docket No. 143.

AUGUST G. REETZ,
Plaintiff in Error,
vs.
THE PEOPLE OF THE STATE OF MICHIGAN,
Defendant in Error.

Brief for Plaintiff in Error.

STATEMENT OF THE CASE.

The plaintiff in error, August G. Reetz, on the 2nd of November, 1900, at the city of Muskegon, in the county of Muskegon and State of Michigan, was arrested upon a criminal warrant issued by a justice of the peace (set forth in the record on page 2), charging him with practicing medicine on the first day of November, 1900, at said city of Muskegon without having complied with the requirements of Act No. 237 of the Public Acts of the state of Michigan for the year 1899. Upon trial before said justice of the

peace, on the 12th of November, 1900, the plaintiff in error was convicted of said offense, and sentenced to pay a fine of $50 or to be imprisoned for the period of seventy (70) days. (R. 3-4.) The plaintiff in error appealed from the judgment of the justice of the peace to the Circuit Court for said County of Muskegon, and on trial in the latter court, on the 28th of November, 1900, he was convicted of said offense; whereupon the case was removed by the plaintiff in error to the Supreme Court of the state of Michigan by the preparation and settlement of a bill of exceptions before sentence. (R. 6, 23.) After a hearing in the Supreme Court of the State of Michigan, the conviction of the plaintiff in error in the Circuit Court for the County of Muskegon, was, on June 4th, 1901, affirmed; whereupon the plaintiff in error procured the allowance of a writ of error from this court to the Supreme Court of the State of Michigan.

It appears that the plaintiff in error practiced in the State of Michigan as a veterinary surgeon for several years prior to 1890, having taken prior to that time a veterinary course of instruction, and having also studied for a time under the instruction of a regular physician. (R. 15, 16.) From 1890 until his arrest, November 2, 1900, he resided at Muskegon, and was engaged either in the study of medicine, the practice of medicine as a student or undergraduate, or the practice of medicine as a regular physician. (R. 13, 14.) By the year 1899 he had become so succcessful a practitioner that his practice during that year was worth about $4,000. (R. 14.)

In September, 1891, the plaintiff in error went to the American Medical College of St. Louis, Mo., and attended that institution until the middle of April, 1892, when he was called home on account of sickness. (R. 14, 17.) On entering this institution, he was admitted to advanced standing on account of his knowledge obtained as a veterinary and as a medical student and practitioner. (R. 16.) On April 23, 1892, shortly after his return from St. Louis, the plaintiff in error filed with the county clerk of Muskegon

County his affidavit in compliance with the medical law then in force, stating that he practiced under the instructions of George S. Gordon, a legally qualified physician. (R. 7.) This affidavit was of the sort required by said medical law to be filed by students or undergraduates in order to entitle them to practice as such students or undergraduates. Plaintiff in error practiced under Dr. Gordon from April, 1892, until the fall of 1897, when he went to Chicago and entered the Independent Medical College located in that city. (R. 18.) He obtained advanced standing at that institution by reason of his work done at St. Louis and his medical knowledge obtained in private study and practice, and was graduated February 18, 1898, after an attendance of five (5) weeks. (R. 14, 19, 20.) On February 21, 1898, the plaintiff in error filed with the clerk of Muskegon County his affidavit as a regular medical practitioner, in compliance with the requirement of the then existing law. In this affidavit he stated:

(1) That he was then engaged in the practice of medicine and surgery at the City of Muskegon.

(2) That he had been engaged in the practice of medicine and surgery in the State of Michigan seven years.

(3) That he was a graduate of the Independent Medical College located in Chicago.

(4) That he graduated from said medical college February 18, 1898, having attended said college five (5) weeks.

(5) That he belonged to the regular school of medicine. (R. 8, 12.)

The law regulating the practice of medicine in force in the state of Michigan, prior to the law of 1899, was Act No. 167 of the Public Acts of 1883, amended by Act No. 268 of the Public Acts of 1887. The law as it existed from 1887 to 1899 (Sections 5279-5285 of the Compiled Laws of 1897), is given in full in the appendix to this brief. Act No. 237 of the Public Acts of 1899, which went into effect September 24, 1899, and under which plaintiff in error was prosecuted, is also given in full in the appendix to this brief. After the said law of 1899 went into effect and a board of

registration in medicine had been appointed and organized, the secretary of said board sent to the plaintiff in error a communication instructing him to make application for registration under the new law, and to send to the board his diploma and a certified copy of his affidavit filed under the previous law. (R. 14, 19.) In accordance with these instructions he sent to the secretary of the board, within the time required by the law of 1899, his diploma from the Independent Medical College, a certified copy of his affidavit filed with the county clerk under the old law in 1898, and the fee of $1 required by law, with a request that he be registered. (R. 14, 19, 11.) The time within which this proof of previous registration might be presented to the board, expired March 24, 1900, the act having gone into effect September 24th, 1899, and six months being allowed for presentation of proof. (Subdiv. 1, Sec. 3.) On February 13, 1900, plaintiff in error received from the board his diploma and a card stating that the board had received his diploma and fee. The first notification which he received that the board declined to give him a certificate of registration, was in the latter part of October, 1900, when he received a letter from the board stating that his certificate and diploma were not accepted. (R. 14, 18.) No claim was made by the board, nor has any claim been made by counsel at any time during this prosecution, that the plaintiff in error did not furnish to the board of registration promptly all documents and information required or requested by said board, or that he was not twenty-one (21) years of age and a man of good moral character. The letter sent to the plaintiff in error by the board of registration in October, 1900, to the effect that his certificate and diploma were not accepted (R. 18), shows that the board refused to register him under the new law for the alleged reason that he had not been "legally registered" under the previous law. The entire cross-examination of the plaintiff in error by the prosecuting attorney during the trial in the Circuit Court for Muskegon County, shows that the theory or claim of the prosecution is that the plaintiff in

error was not legally registered under the old law. (R. 14, 15, 20, 21.)

On the trial in the Circuit Court for Muskegon County, counsel for plaintiff in error objected to the admission of any evidence on the ground that Act No. 237 of the laws of 1899, under which the plaintiff in error was prosecuted, was in violation of the Constitution of the United States. The court overruled the objection and counsel for plaintiff in error duly excepted to the ruling of the court. (R. 6, 7.) By agreement in open court it was stipulated that all the testimony taken in the case should be taken subject to the same objection and exception. (R. 7, 9.) At the close of the testimony in the case, counsel for the plaintiff in error requested the court to direct the jury to return a verdict of not guilty on the ground that said statute on which the prosecution was founded, was "unconstitutional and void as being in conflict with the Constitution of the United States and the amendments thereto, especially section 1 of the 14th." The court over-ruled the motion and counsel for plaintiff in error duly excepted to the ruling of the court. (R. 22.)

The plaintiff in error was convicted under the charge of the court, and on removing the case to the Supreme Court of the State of Michigan, a bill of exceptions was duly settled containing the substance of all material testimony given on the trial, and the plaintiff in error assigned error upon the overruling of his said objection to the admission of evidence, and upon the overruling of his said motion to direct a verdict of not guilty. (R. 23, 24. Assignments of error Nos. 2, 4, 8.) These assignments of error were insisted upon at the hearing in the Supreme Court of the State of Michigan, and were then and there overruled by said Supreme Court, and the conviction of the plaintiff in error was affirmed, and the Circuit Court for the County of Muskegon was directed to proceed to judgment. (R. 25, 26.) The Michigan Supreme Court did not go into any extended discussion of the question, but stated that the constitutionality of the act of 1899 was settled by the former decisions

of the court, thus disposing at once of the objections made to the law on the ground of conflict with the federal constitution, as well as objections based on the state constitution. (R. 25, 26.) In one of the former decisions referred to, People vs. Phippin, 70 Mich., 6, we find it decided that the medical law of 1883 was not in violation of section 1 of Article 14 of the Amendments to the Constitution of the United States, nor of various other portions of said constitution. It will thus be seen that the federal questions raised in the Muskegon Circuit Court and there overruled, were passed upon by the Michigan Supreme Court, and the rights of the plaintiff in error, claimed under the Constitution of the United States, were there denied.

SPECIFICATION OF ERRORS RELIED UPON.

The Supreme Court of the State of Michigan committed error:

(1) In affirming the conviction of plaintiff in error by the Circuit Court for the County of Muskegon, although the said Circuit Court committed manifest error in refusing to sustain the objection to the admission of testimony made by counsel for the plaintiff in error and set out on page 6 of the record, on the ground that said Act No. 237 of the Public Acts of the State of Michigan of 1899 is in conflict with the Constitution of the United States. This objection to the admission of testimony was made to apply to all the testimony admitted upon the trial. (Assignment No. 3, R. 29.)

(2) In affirming the conviction of the plaintiff in error by the Circuit Court for the County of Muskegon, although said Circuit Court committed manifest error in overruling the motion made by counsel for plaintiff in error and set out on page 22 of the record, asking the court to direct the jury to return a verdict of not guilty on the ground that the statute under which the plaintiff in error was prosecuted, was unconstitutional and void, as being in conflict with the Constitution of the United States and the amendments thereto, especially section 1 of the 14th. (Assignment No. 4, R. 29.)

The motion of the plaintiff in error for an instruction by the court to the jury to return a verdict of not guilty, was in the following words:

"I ask the court to direct the jury to return a verdict of not guilty on the ground that there is no offense charged in this warrant, no offense proven against this respondent, and on the further ground that the statute under which it is claimed this action is brought, is unconstitutional and void, as being in conflict with the Constitution of the United States and the amendments thereto, especially section 1 of the 14th." (R. 22.) Thereupon the court overruled the motion, counsel took exception to the ruling of the court, and the court instructed the jury as follows:

"In this case, gentlemen of the jury, if you believe the uncontradicted testimony in the case, it will be your duty to find the defendant guilty as charged. The presumption is that he is innocent of the crime charged, and you should examine the evidence upon that basis, and you should be satisfied beyond all reasonable doubt of his guilt before you would have a right to convict; and that doubt would be a fair and honest doubt based upon reason and common sense.

As I say, if you believe the undisputed testimony in the case, it would be your duty to find a verdict of guilty." (R. 22, 23.)

It will be claimed by the plaintiff in error:

(1) That the said Act No. 237 of the Public Acts of the State of Michigan for the year 1899, is in conflict with section 1 of the 14th amendment of the Constitution of the United States, in that said act deprives persons, including the plaintiff in error, of liberty and property without due process of law, and denies to persons within the jurisdiction of the State of Michigan, including the plaintiff in error, the equal protection of the laws.

(2) That said act is in conflict with subdivision 1 of section 10 of article 1 of the Constitution of the United States, in that said act is a bill of attainder and is an ex post facto law.

BRIEF OF ARGUMENT.

Legislative Deprivation of Rights.

The statute of 1899, under which the plaintiff in error was prosecuted, and the act previously in force, namely, Act No. 167 of 1883, as amended in 1887, are both set cut in full in the appendix at the end of this brief. Subdivision 1 of section 3 of the Act of 1899 is as follows:

"The applicant shall be registered and given a certificate of registration if he shall present sufficient proof within six months after the passage of this act, of his having already been legally registered under Act No. 167 of 1883 as amended in 1887, entitled 'An Act to promote public health.' The fee for applicants of this class shall be one dollar."

Plaintiff in error had been practicing medicine within the state for several years and had registered under the previous law. (R. 13, 14, 19.) Subdivision 1 above quoted was evidently intended to apply to the great class of physicians already practicing medicine at the time of the passage of the law. If unable to meet the requirements of this subdivision, a physician would be debarred from practicing in future unless he should either (1) pass a satisfactory examination in certain subjects, paying a fee of ten dollars for the examination, or (2) present evidence of registration in a foreign country having requirements equal to those prescribed by this act, paying a registration fee of twenty-five dollars, or (3) present evidence of registration in another state having requirements equal to those prescribed by this act, paying for registration a fee of ten dollars, or (4) present a diploma from a "legally incorporated, regularly established and reputable college of medicine," in the United States, "having at least a three years' course of eight months in each year, or a course of four years of six months in each year." (Section 3 of the Act of 1899.)

It will thus appear that the plaintiff in error and others of his class, unless they shall meet the requirements of said subdivision 1, are deprived of their right to practice medicine in the future absolutely, unless they shall choose to

comply and shall be able to comply with certain other requirements involving expense, labor and the sacrifice of time, and with which requirements it might be impossible for large numbers of them to comply. In order to become legally registered under the old law, it was only necessary for a physician either to have practiced five years prior to the passage of the law in 1883, or to be a graduate of a "legally authorized medical college" in the United States or some other country, it being required in addition that each physician should file his affidavit with the county clerk giving certain information and stating the facts that would make him qualified. (Act of 1883, Section 2.) It is plain that many could become qualified under these provisions of the old law, and, through subdivision 1 of the new law, who would not be entitled to registration under any other subdivision of the new law. They might not have studied and become proficient in all of the sixteen subjects required for examination by the law of 1899; they probably would not have and would be unable to get, without great difficulty and expense, a license in any foreign country or in any other state of the Union. Possibly none of them would be able to meet the requirements in any of the other states or foreign countries where "the requirements for registration" should be deemed by the Michigan board of registration "to be equivalent to those" in force in Michigan. It is provided that licenses from other states and foreign countries shall not be recognized unless such states or countries "accord a like privilege to holders of certificates from" the Michigan board; and there was no certainty that any state or foreign country would accord such privilege. And even though physicians were graduates of a "legally authorized medical college" in the United States or some other country, as required by the law of 1883, they might not be graduates of a "legally incorporated, regularly established and reputable college of medicine," in the United States, "having at least a three years' course of eight months in each year, or a course of four years of six months in each year," as required in the law of 1899. (Sec. 3, subdivision 5.) It

will thus be seen that the right which remained to old practitioners to continue in practice without being compelled to meet the new requirements of the law of 1899, was an important and valuable right.

It was clearly the intention of the act of 1899 not to interfere with the right of old practitioners to continue in practice, and not to compel them to meet any of the new requirements above mentioned, provided such old practitioners had not been practicing medicine unlawfully, that is, without legal registration under the previous law. Although not stated in exactly this language, this is the plain meaning of subdivision 1 above quoted. Its provisions were designed to apply to those already practicing medicine as a class. If they had been practicing lawfully, they might procure registration under the new law without any trouble and at a nominal expense. If they had been practicing unlawfully, they were denied absolutely the right to continue in practice unless they could comply with certain other stringent and perhaps impossible requirements and should incur a much larger expense. That it is proper to judge a law by its effect rather than by the language on the surface, is settled by many decisions of this court. In the case of Henderson vs. Mayor of New York, 92 U. S., 259, 268, Mr. Justice Miller, giving the unanimous opinion of the court, says:

"In whatever language a statute may be framed, its purpose must be determined by its natural and reasonable effect."

In that case a state law was held unconstitutional as a tax upon the bringing of immigrants into the country, athough the law did not require the tax to be paid unless the masters of vessels should choose not to comply with certain other requirements concerning the giving of bonds. In the case at bar, although the statute on its face only requires an old practitioner to prove that his registration was not illegal, the clear effect upon the thousands of men who had been practicing for years, was to require them to show that they had not been guilty of the unlawful act of practicing medi-

cine without being authorized to practice, and to show that they were not then subject to the penalties provided in the previous law for unlawful practice.

What is the nature of this condition upon which the physician's right to continue in his profession was made to depend? Section 1 of the Act of 1883, which was in force until the passage of the Act of 1899, provided:

"It *shall not be lawful* for any person to practice medicine or surgery or any branch thereof (except dentistry) in this state without having the qualifications required in the provisions of this act, and without having first registered in the office of the county clerk as provided in this act."

Certain penalties are pescribed for the violation of the terms of the act.

Section 4 provides:

"No person who practices medicine, surgery or midwifery in any of their branches (except dentistry) shall be able in any of the courts of this state, to collect pay for professional services rendered subsequent to the time that this act shall take effect, unless he was at the time such professional services were rendered, duly qualified and registered as a medical practitioner according to the several provisions of this act."

Section 6 provides:

"Whoever advertises or holds himself out to the public as authorized to practice medicine or surgery in this state, when in fact he is not so authorized under the provisions of this act, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be liable to a fine of not less than five dollars nor more than fifty dollars for each offense."

The provisions of both section 4 and section 6 are clearly penal. All physicians practicing without legal registration would be liable to the penalty contained in section 4; and without doubt nearly all of them would be liable to the penalty contained in section 6, for most of those practicing without legal registration would also hold themselves out to the public as authorized to practice. Section eleven of the Law of 1899 repeals the Law of 1883 and the amendment of 1887, "except as to *all penalties* which shall have accrued thereunder." It is plain, therefore, that the legislature un-

derstood both section 4 and section 6 of the law of 1888, above quoted, to contain penal provisions, unless the unaccountable and improbable intention could be attributed to the legislature, to relieve unregistered physicians from their disability to collect for services by suit.

It thus appears that the condition, upon which a physician was not interfered with by the act of 1899 and compelled to stop practicing or conform to the other rigid requirements of the act, was that prior to the passage of that law, he had not been guilty of an unlawful act denounced in the previous law and punished by certain penalties therein contained.

Statement of Questions to be Considered.

Granting, for the sake of argument, that it would be competent for the legislature to make the continuation of his practice by a physician depend upon his freedom in the past from unlawful or criminal acts, let us first examine into the means and machinery provided by the law of 1899 for determining whether the applicant for registration had been guilty of an unlawful act, in order that we may determine whether the proceedings provided were of such a nature that they constitute due process of law. In the second place we shall consider whether it was competent for the legislature to make a physician's right to continue in practice dependent upon such conditions as were embodied in this act.

I.

Due Process of Law.

1. A Legal Question Involved.

By the very language of the act of 1899, the board of registration in medicine is given the authority to determine a legal question, and there is no right of appeal allowed from its decision. In subdivision 1 of section 3 it is provided that the applicant shall be registered "if he shall present sufficient proof within six months after the passage of this act of his having already been *legally registered* under

act No. 167 of 1883." The board is not to determine certain definite facts, as administrative boards are frequently and properly given the authority to do. The board is to determine a *legal question*, and this is a question which no tribunal other than a regularly organized court could properly decide. This is so for the following reasons:

(a) In determining this question the board must pass upon the legal sufficiency, in matters of form as well as of substance, of the affidavit filed by the applicant with the county clerk under the law of 1883. Suppose this affidavit to lack some of the technical requirements of a complete affidavit; suppose, for example, that the name of the county is omitted from the venue, or that the officer before whom the affidavit is made fails to insert the complete date or fails to describe himself by his complete official title; the validity of affidavits presenting these or other similar features, has been the basis of much judicial reasoning in courts of every grade, and courts of last resort have differed in their solutions of the legal questions involved. Is it possible that such questions can be properly left to a board possessing almost none of the attributes and powers of a court? Suppose, further, that the language in which the necessary facts are stated in the affidavit, is of such an indefinite or incomplete character that it becomes doubtful whether the affiant has sworn to the truth of any statement in such a manner that the falsity of the statement would make him liable to the pains and penalties of perjury. This situation might easily arise on account of the negligent omission of important words. It would raise a question which would be preeminently a legal question requiring the determination of a court. Suppose, again, that the statement of the required information in the affidavit was made in language so general that it should become doubtful whether the affiant had sufficiently given the specific information required by the statute. This would raise a question purely legal in its nature and requiring the learning of a court to determine it. We do not know of any case in which the final or even the original jurisdiction of a mere board to determine legal questions of

this nature, has been upheld. We have found no medical law, or law regulating any other profession, which is at all similar in its language to this subdivision of the law of 1899.

(b) In passing upon the question whether an applicant was legally registered under the law of 1883, if the applicant had registered under the provisions of subdivision 2 of section 2 of that law, it would be necessary for the board to pass upon the question whether the medical college of which the applicant was a graduate, was at the time of such graduation "legally authorized" by the state or foreign country in which it was located. This presents another question which is purely legal upon the face of it. The legality of the authorization of a medical college would depend upon the constitutionality of the statute creating or incorporating it, and the question would involve the interpretation of the terms of such statute, so as to raise many nice legal questions as to whether the acts of the incorporators or managers of the college had substantially complied with the law. If the college happened to be located outside of the State of Michigan, the determination of the question whether it was "legally authorized" or not, would involve a question in the law of another state or a foreign country, a question peculiarly calling for the skill and learning of a court of law assisted by counsel, rather than a state board made up of doctors. These suggestions will give some idea of the many perplexing and technical legal questions which the state board is empowered by the law of 1899 to decide, without even the right of appeal from its decision. The determination of such questions is a judicial function in both form and substance, and the confiding of such power to a body not a regularly organized court of justice, or at least to a body not possessing the essential powers and attributes of a court, does not constitute due process of law.

In the case of Chicago, Milwaukee and St. Paul Ry. vs. Minnesota, 134 U. S., 418, it appeared that the State of Minnesota had passed a statute providing for a state railway commission, and providing that such commission might fix the rates to be charged by the railways of the State, and

that such determination of rates should be conclusive upon the railways, no provision being made for any judicial inquiry into the reasonableness of the rates so fixed. This court held the Minnesota statute to be in violation of section 1 of the 14th amendment to the federal constitution, the court, through Mr. Justice Blatchford, saying, page 457:

"It (the statute) deprives the company of its right to a judicial investigation, by due process of law, under the forms and with the machinery provided by the wisdom of successive ages for the investigation judicially of the truth of a matter in controversy, and substitutes therefor, as an absolute finality, the action of a railroad commission which, in view of the powers conceded to it by the state court, cannot be regarded as clothed with judicial functions or possessing the machinery of a court of justice."

In like manner we may say of the Michigan medical law of 1899, it deprives every practicing physician of his "right to a judicial investigation, by due process of law, under the forms and with the machinery provided by the wisdom of successive ages for the investigation judicially of the truth of a matter in controversy, and substitutes therefor, as an absolute finality," the action of a state board of registration, which, in view of the express terms of the statute creating it, "cannot be regarded as clothed with judicial functions or possessing the machinery of a court of justice." The judicial investigation of which he is thus deprived is an investigation into the legal question whether his registration under the law of 1883 was legal, and involves directly the question whether he has been guilty of unlawful or criminal acts in the past.

2. Requirements of Due Process of Law.

The most important requirement of a judicial or quasi-judicial proceeding, is that it should give to persons accused or interested the benefit of a hearing. Due process of law requires opportunity for a hearing in every instance, but the law is especially jealous of this right when the question to be determined involves an inquiry into a person's guilt or innocence of a crime or unlawful act. Under such circumstances a party is entitled not only to the privilege of

a hearing, but he is entitled also to the right not to be a witness against himself, and he is entitled to have compulsory process for the summoning of witnesses in his own behalf. In cases of a criminal nature he is entitled to be confronted with the witnesses who are to establish his guilt, and his guilt must be proved by those asserting it; he must not be required to prove himself innocent of the charge. The medical act of 1899 is subject to all these objections. Nowhere is the board given the authority to summon witnesses or compel them to testify. Nowhere is there provision made for any hearing, nor is the applicant given any right to compel the attendance of witnesses in his own behalf. Nowhere is he given the right to be confronted by the witnesses against him. On the contrary, he is required to prove his own innocence. His rights can be obtained only by his presenting "sufficient proof" of his having been legally registered, which means, in effect, that he must prove himself not to have been a law-breaker in practicing medicine prior to the law of 1899. It would seem too plain to admit of argument that such a proceeding is not due process of law. Suppose that, in order to establish his innocence of the charge of practicing unlawfully and prove the legality of his registration, the applicant should need the testimony of the county clerk or the officer before whom he made his affidavit, or any other witness whose testimony might help to show the facts upon which the legality of his registration or the legal authorization of his college would depend; without such testimony his rights would be forfeited, but he has no way in which to compel the attendance of the needed witnesses. In civil cases parties are universally accorded the right to summon witnesses in their own interest and to compel witnesses to attend and give testimony by means of the process of the court. In cases of a criminal or quasi-criminal nature, this right is rigorously guarded in all jurisdictions in which the principles of Anglo-Saxon jurisprudence prevail. The only possible conclusion is this,—in order to deprive the physician of his right to continue in practice, if the legislature saw fit to make that right in any

way or degree depend upon his freedom from unlawful acts in the past, the law-making body should refuse registration to such only as had been or should be duly adjudicated to be guilty of such unlawful acts by a court competent to pass upon the legal questions involved. The least that the legislature could do under such circumstances, and keep within the limits of due process of law, would be to provide a tribunal posssesing the powers necessary to give persons interested a fair hearing, the right to secure the testimony of witnesses in their own behalf and the right to have their unlawful acts established affirmatively without being required to prove their own innocence.

In the case of Schlitz vs. Roenitz, 86 Wis., 31, 40, the Supreme Court of Wisconsin thus states the requirements of judicial proceedings:

"Due process of law as applied to judicial proceedings, includes a charge before some judicial tribunal, a notice to the party in some form, either actual or constructive, and an opportunity to appear and produce evidence in his defense and be heard by himself or counsel."

In the case of Pennoyer vs. Neff, 95 U. S., 714, 733, this court, speaking through Mr. Justice Field, says:

"Whatever difficulty may be experienced in giving to those terms (due process of law) a definition which will embrace every permissible exertion of power affecting private rights, and exclude such as is forbidden, there can be no doubt of their meaning when applied to judicial proceedings. They then mean a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights. To give such proceedings any validity, there must be a tribunal competent by its constitution—that is, by the law of its creation—to pass upon the subject-matter of the suit."

See also State vs. Carneall, 10 Ark., 156.

It may be said without fear of contradiction, that the duties which the act of 1899 attempts to confide to the state board of registration are, at least, of a quasi-judicial character and would involve action of the board requiring the exercise of discretion, so that after such exercise, the de-

cision of the board would not be reviewed by a court in mandamus proceedings. State vs. State Board of Health, 103 Mo., 22.

Even under these circumstances it would not be allowable to deprive persons of important rights without much greater safeguards than are provided in this law. Certain forms for the protection of liberty and property rights must be observed even by purely administrative boards.

In the case of Stuart vs. Palmer, 74 N. Y., 183, it was held that a law imposing an assessment for a local improvement, without notice and a hearing or opportunity to be heard on the part of the owner of the property to be assessed, has the effect of depriving such owner of his property without due process of law, and is unconstitutional. The court, speaking through Justice Earle, says (page 190-191.):

"'Due process of law' is not confined to judicial proceedings, but extends to every case which may deprive a citizen of life, liberty or property, whether the proceeding be judicial, administrative or executive in its nature. This great guaranty is always and everywhere present to protect the citizen against arbitrary interference with these sacred rights. * * * It may, however, be stated generally that due process of law requires an orderly proceeding adapted to the nature of the case, in which a citizen has an opportunity to be heard and to defend, enforce and protect his rights. A hearing or an opportunity to be heard, is absolutely essential. We cannot conceive of due process of law without this."

We may search the entire record in the case at bar and we shall find no indication that the statute provided, or that the board for itself adopted any procedure which might be called "an orderly proceeding adapted to the nature of the case," or in which this plaintiff in error or any other physician had even an apportunity to be heard upon the disputed question as to the legality of his registration or as to his previous commission of unlawful acts. The record shows nothing except (1) a communication from the board to the plaintiff in error, consisting of a copy of the statute and a direction to send his diploma and a certified copy of his

previous registration under the old law (R. 14, 19); (2) the sending to the board by the plaintiff in error of said diploma, said certified copy and the required fee (R. 14, 19); (3) a notification to plaintiff in error by the board that it had received his diploma and fee, the diploma being returned to the plaintiff in error, and later a simple notice from the board that his certificate and diploma were not accepted. (R. 14, 18.) This latter notification came about seven months after the expiration of the time within which evidence could be presented to the board concerning the legality of registration. (R. 14.) There was no notice to the plaintiff in error that the legality of his registration was disputed, and that the board would consider the matter at a certain time and place, at which time and place he could be heard by counsel or in person. In the language of Justice Earle, such a hearing or opportunity to be heard was "absolutely essential" in order to afford due process of law. If the board of registration was to pass upon the legal question whether he was legally registered or not, could there be any excuse for not affording the plaintiff in error opportunity to be heard by counsel upon this legal question? Such argument by counsel might have convinced the board that his registration was legal. Was the legal knowledge of this board of registration, composed entirely of physicians, so great that it could decide whether the registration was legal or not, without availing itself of the research and learning of counsel, a course never pursued even by the highest courts of justice composed of men learned in the law? It is a significant fact also that no right of appeal is given from the decision of the board of registration. The right to have the errors of law committed by an inferior court or body, corrected by a superior court, is one of the most common of the provisions which, in the language of Mr. Justice Field above quoted, "have been established in our systems of jurisprudence for the protection and enforcement of private rights." As decided by this court in Chicago, Milwaukee and St. Paul Ry. vs. Minnesota, *supra*, if important legal questions are originally

confided to an administrative body, the right to review its decision in a court of justice is an absolute necessity.

As to the necessity for a hearing and orderly procedure when rights are divested by quasi-judicial bodies, see further:

Hutson vs. Woodbridge Protection District, 79 Cal., 90.

Gamble vs. McCrady, 75 N. Car., 509.

Mercantile Trust Co. vs. Texas Pacific Ry. Co., 51 Fed. Rep., 529.

It may be said that although the act of 1899 conferred upon the board of registration none of the ordinary powers of a court, except that it gave the president and secretary the power to administer oaths, and although no form of procedure was provided for, and none of the machinery of a judicial or quasi-judicial body was created, yet the board of registration was at liberty to go on and devise such forms and procedure as would be proper and create the necessary machinery.

In answer to this it may be said that if the act of 1899 conferred judicial power upon the board of registration, as we think it undoubtedly did, the creating of procedure and machinery necessary for the hearing of judicial controversies could not be left to the board. No court designed for the original trial of controversies was ever created in such a manner and left to devise whatever procedure it might see fit, or no procedure at all; but the rights of parties and the forms necessary to be observed for the protection of those rights, are always prescribed by law. And above all, the court is given the essential powers of a court, the power to compel witnesses to attend and testify, and other powers necessary to the transaction of its business. If it should be held that the act of 1899 confers upon the board of registration only quasi-judicial powers, it is still certain that for the appropriate and orderly determination of the questions entrusted to it, the power to compel witnesses to attend and testify is absolutely necessary. Without this, the appli-

cant would in many cases be unable to produce existing proof which would be sufficient to show that his previous registration was legal. Even if it should be thought that the board had the necessary power to devise proper machinery and procedure for the determination of the questions entrusted to it, the fact remains that the board did not do so; and the obvious effect of the law is to deprive the plaintiff in error and other physicians of their liberty and their property in their profession, without the forms and safeguards necessary topro tect their rights. As disclosed in the record, the custom of the board was merely to notify a physician to present his diploma and a certified copy of his affidavit previousy filed with the county clerk. In the case of the plaintiff in error, these were merely sent to the board in accordance with its direction and without further communication, until about three months later, when the diploma was returned; and about seven months after the time for presenting proofs had expired, plaintiff in error was notified for the first time by the board that his diploma and the certified copy of his affidavit were not accpted and he could not be registered. (R. 14, 18, 19.) Does this record disclose anything in the way of procedure calculated to protect the rights of an applicant? An applicant believes his former registration to be legal, and he sends to the board all the proofs which it, in an official communication, directs to be sent. These proofs are fair and satisfactory upon their face. If afterward a question arises as to the legality of the applicant's previous registration, is he not entitled to a notice of that fact in order that he may, while yet there is time, produce the necessary supplementary proofs to show that his registration was in fact legal? And if legal questions are involved in the question of such legality, as they necessarily are involved in this case, is not the applicant entitled to notice of a contest upon this question and an opportunity to be heard by counsel or in person upon these legal questions? In the case of O'Hara vs. Stack, 90 Pa. St., 477, the court says:

"It is a maxim of fundamental law that no man shall be condemned without a hearing. A hearing assumes notice of specific grounds of complaint and a reasonable opportunity for answering them."

In the case at bar, what "specific grounds of complaint" were communicated to the plaintiff in error? What "opportunity for answering them" was afforded him? He was not informed in what respect it was claimed that his registration was illegal. The law made no provision for this or for affording him an opportunity to answer the charge.

It cannot be denied that, whatever the effect of the law of 1899 is upon its face, its interpretation by the board and the manner in which it has been carried out, have had the effect to make it obnoxious to the constitutional provisions above enumerated. This fact is fatal to the constitutionality of the statute according to the repeated adjudications of this court.

In the case of Yick Wo vs. Hopkins, 118 U.S., 356, 373, Mr. Justice Matthews, giving the unanimous opinion of the court, says:

"Though the law itself be fair on its face and impartial in appearance, yet if it is applied and administered by public authority with an evil eye and unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances material to their rights, the denial of equal justice is still within the prohibition of the constitution. This principle of interpretation has been sanctioned by this court in Henderson vs. Mayor of New York, 92 U. S., 259; Chy Lung vs. Freeman, 92 U. S., 275; Ex Parte Virginia, 100 U. S., 339; Neal vs. Delaware, 103 U. S., 370; Soon Hing vs. Crowley, 113 U. S., 703."

So in the case at bar, the deprivation of the plaintiff in error of the right to practice medicine by the board of registration, without any hearing or opportunity for hearing and without the means of producing the necessary evidence, discloses such an interpretation of the law and such a custom of procedure on the part of the board of registration as amounts to the plainest violation of the federal constitution.

3. Character of Rights in a Profession or Calling.

The right of a person in his profession is such a right that to deprive him of the privilege of pursuing it without due process of law, is to deprive him of both his liberty and his property without due process of law. In the case of Butchers' Union Co. vs. Crescent City Co., 111 U. S., 746, Mr. Justice Field in his concurring opinion, page 757, says:

"The common business callings of life, the ordinary trades and pursuits which are innocuous in themselves, and have been followed in all communities from time immemorial, must, therefore, be free in this country to all alike upon the same conditions. The right to pursue them without let or hindrance except that which is applied to all persons of the same age, sex and condition, is a distinguishing privilege of citizens of the United States and an essential element of that freedom which they claim as their birthright."

"It has been well said that, 'The property which every man has in his own labor, as it is the original foundation of all other property, so it is the most sacred and inviolable. The patrimony of the poor man lies in the strength and dexterity of his own hands, and to hinder his employing this strength and dexterity in what manner he thinks proper without injury to his neighbor, is a plain violation of this most sacred property. It is a manifest encroachment upon the just liberty both of the workman and of those who might be disposed to employ him, as it hinders the one from working at what he thinks proper, so it hinders the others from employing whom they think proper.' Adam Smith's Wealth of Nations, Book 1, chapter 10."

In his concurring opinion in the same case, Mr. Justice Bradley, in speaking of the Louisiana statute giving a monopoly to a particular corporation, says, page 765:

"But if it does not abridge the privileges and immunities of a citizen of the United States to prohibit him from pursuing his chosen calling and giving to others the exclusive right to pursue it, it certainly does deprive him (to a certain extent) of his liberty; for it takes from him the freedom of adopting and following the pursuit which he prefers; which, as already intimated, is a material part of the liberty of the citizen. And if a man's right to his calling is property, as many maintain, then those who had already adopted the prohibited pursuits in New Orleans, were deprived by the law in question of their property as well as their liberty without due process of law."

In the case of State vs. Staten, 46 Tenn., 233, it was decided that the elective franchise is a property right within the meaning of the expression "to deprive of property without due processs of law." It was accordingly held unconstitutional for the legislature to vest in the governor the authority to set aside the registration of voters, in certain districts, on account of fraud and irregularities in registration, and thus deprive the electors of those districts of their right to vote without any opportunity for them to be heard in their defense.

The right of a person to employ his property or labor to the best advantage as he may see fit, is universally held to be protected by the constitutional provision against depriving persons of life, liberty or property without due process of law. In addition to the above cases, we may cite In re Jacobs, 98 N. Y., 98. The statute of the state of New York provided that in cities of over 500,000 inhabitants, it should be unlawful to manufacture cigars or other tobacco product in a tenement house containing as many as four separate families. It was held to deprive persons of both liberty and property without due process of law.

In the case of Allgeyer vs. Louisiana, 165 U. S., 578, 589, Mr. Justice Peckham, giving the unanimous opinion of the court, says:

"The liberty mentioned in that amendment (the 14th amendment of the Constitution of the United States) means not only the right of the citizen to be free from a mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned."

In the case of Powell vs. Pennsylvania, 127 U. S., 678, 684, Mr. Justice Harlan, giving the opinion of the court, says:

"The main proposition advanced by the defendant is that his enjoyment upon terms of equality with all others in similar circumstances of the privilege of pursuing an ordinary calling or trade and of acquiring, holding and selling property, is an essential part of his rights of liberty and property as guaranteed by the 14th amendment. The court assents to this general proposition as embodying a sound principle of constitutional law."

See also:

People vs. Marx, 99 N. Y., 377.

Ritchie vs. People, 155 Ill., 98.

O'Hara vs. Stack, 90 Pa. St., 477.

In the case last cited the court says: "A man's profession is his property."

4. Discussion of Analogous Cases.

The impropriety of confiding to administrative officers or boards, such powers as are by the Michigan statute given to the state board of registration, has often been the subject of judicial comment.

The case of State vs. Allen, 2 McCord (S. Car.), 55, is closely analogous to the case at bar. A statute of South Carolina provided:

"That a tax of ten thousand dollars be and the same is hereby imposed upon every person or persons, who shall, after the passing of this act, open or keep open any office for the sale of any lottery tickets, or who shall sell within this state any lottery tickets in any other lottery than those which are authorized by the laws of this state. And it shall be the duty of the tax collectors in the district where such lottery offices are opened, in default of the person or persons keeping such offices to return the same and pay the tax imposed by this law, to issue his execution as in other cases of defaulters."

The defendants opened a lottery office and refused to pay the tax, whereupon the collector issued his execution. The action was brought to secure the writ of prohibition to restrain the collection of the tax by execution. In that case the form of the proceeding by which it was sought to deprive the citizen of his property, was civil, but the court

held that the imposition of the tax was in reality a penalty for the opening of the lottery office. So in the case at bar, the proceedings to deprive the plaintiff in error of his right to practice medicine, that is, the proceedings had by the state board of registration, while not criminal in form, were really for the purpose of imposing a penalty for the unlawful act of practicing without being legally registered. In that case the court held that an administrative officer, like a tax collector, could not be empowered to judge whether the defendants had committed the acts which would make them liable to the imposition of the penalty. So in the case at bar, the state board of registration, a body without the powers or attributes of a court, and without the powers necessary for proper and complete investigation, could not judge whether the plaintiff in error had been guilty of the unlawful act of practicing without legal registration, which act would make him liable to be deprived of his right to continue in practice.

After deciding that the issuing of the execution was legal, if the sum of $10,000, for which it was issued, was really a tax, the court continues, page 61:

"The second question presents the case in a very different shape. The sum of ten thousand dollars is imposed upon every person who shall 'open or keep open any office for the sale of lottery tickets, or shall sell any lottery tickets,' etc. It is not laid upon the property; it is not laid upon the person, nor on the income; it is not measured by the value of the property, nor the amount of the proceeds derived from the office, but is in fact a penalty on the act of opening, keeping open an office, or selling the tickets. It is not limited in its operation within any definable bounds, but may be ramified into as many ten thousand cases as there are persons concerned in the act of selling. The act also, in substance, declares its object to be the suppression of vice. It appears to me, therefore, as much a penalty as the sum of one hundred pounds formerly inflicted upon a person who should be convicted of killing a negro, and the question is, whether it is to be considered a tax merely because the act has called it so? If the nature of the thing can be changed by merely changing the name, every penalty may be converted into a tax. And there can be no doubt but that the numerous assaults and battery and other misdemeanors with

which our courts are crowded, would become fruitful sources of revenue to the state. But it would be a commutation much more friendly to the civil list than to the liberty of the citizen; and if they had not been willing to have renounced the one, to have secured the other, the article of the constitution now under consideration, need never to have been penned. If it is to be considered in the nature of a penalty (and I can have no other view of it), it is a direct and manifest violation of the constitution. It is the last clause of the act, and in all probability was introduced near the close of the session, the period of time least propitious to that due deliberation with which the acts of that body are usually marked. I cannot believe that there was an individual member of that legislature, who would deliberately consent to authorize a tax collector, at his arbitrary will and pleasure, to adjudge a person guilty of an act which would subject him to a penalty of ten thousand dollars, and issue his execution either against his goods or his person for the amount, without even the semblance of a trial. I have already shown what is to be understood by the words in the constitution, 'the law of the land.' The constitution intended to impose a restraint upon the legislature as well as upon the other departments of government; and it would have been idle to impose upon them a restraint which it was in their power to remove, by performing the very act which it was intended to prevent. The constitution, says Judge Patterson, is the form of government delineated by the mighty hand of the people, in which certain first principles of fundamental laws are established. It fixes the limits to the exercise of legislative authority, and prescribes the orbit within which it shall move. It says to the legislature, so far shalt thou go and no farther. Our constitution prohibits the legislature to 'deprive any man of his liberty, except by his peers, or by the law of the land;' yet this act gives to the tax collector authority to adjudge the person accused guilty of the act charged against him without a trial by jury, or in any other form, and to enforce the payment of the penalty by imprisonment, if he has no property out of which the money can be made; and if there is any principle of constitutional law by which it can be justified, I have yet to learn where it is to be found. I do not contend that the legislature could not enforce such a penalty (or lay such a tax, if that phraseology is more agreeable, though I think it to be incorrect), nor that they cannot prescribe the mode of compelling the payment of it, but that the liability of the party must first be established by a jury of his country, and not by the arbitrary fiat of any individual."

The case of Huber vs. Reily, 53 Pa. St., 112, is also

analogous to the case at bar. The act of Congress of March 3, 1865, imposed a forfeiture of citizenship and its rights as an additional penalty for the crime of desertion. Henry Reily, plaintiff, brought an action on the case against Benjamin Huber, alleging that the defendant, acting as judge of election, unlawfully refused to receive the plaintiff's vote at an election held in the state of Pennsylvania. It was admitted that the plaintiff was a qualified elector unless disfranchised by the aforesaid act of Congress, the law of Pennsylvania requiring electors to be citizens of the United States, and it was admitted that the defendant refused to receive his vote on the ground that the plaintiff was a deserter from the military service of the United States. It was further admitted that the plaintiff had been regularly drafted into said military service at a time when he was liable to such service, had been served with the draft notice and had never reported to the military authorities or furnished a substitute, and that he was registered by the provost-marshal of the district as a deserter. The question to be determined was whether a judge of election or board of election officers constituted a tribunal competent to determine that the plaintiff had been a deserter and had lost his rights of citizenship by reason of the said act of Congress. The court held the said act not to be an ex post facto law for the reason that the forfeiture of citizenship might be understood as a penalty for failure to report for duty after the passage of the act, rather than as an additional penalty for the original crime of desertion committed before its passage. The court held that said act could not confer upon the board of election officers in any state the power to decide whether a person offering to vote had been guilty of the crime of desertion. In considering the question whether the act would be constitutional or not, if it attempted to confer such power, the court, after quoting certain sections of the federal constitution, says, page 117:

"The spirit of these constitutional provisions is briefly, that no person can be made to suffer for a criminal offence unless the penalty be inflicted by due process of law. What that

is, has been often defined, but never better than it was, both historically and critically, by Judge Curtis, of the Supreme Court of the United States, in Den vs. Murray, et al., 18 Howard, 272. It ordinarily implies and includes a complainant, a defendant and a judge, regular allegations, opportunity to answer and a trial according to some settled course of judicial proceeding. It must be admitted there are a few exceptional cases. Prominent among these are summary proceedings to recover debts due to the government, especially taxes and sums due by defaulting public officers. But I can call to mind no instance in which it has been held that the ascertainment of guilt of a public offence and the imposition of legal penalties, can be in any other mode than by trial according to the law of the land or due process of law, that is, the law of the particular case, administered by a judicial tribunal authorized to adjudicate upon it. And I cannot persuade myself that a judge of elections or a board of election officers constituted under state laws is such a tribunal. I cannot think they have power to try criminal offenders, still less to adjudge the guilt or innocence of an alleged violator of the laws of the United States. A trial before such officers is not due process of law for the punishment of offences according to the meaning of that phrase in the constitution. There are, it is true, many things which they may determine, such as the age and residence of a person offering to vote, whether he has paid taxes, and whether, if born an alien, he has a certificate of naturalization. These things pertain to the ascertainment of a political right. But whether he has been guilty of a criminal offence, and has, as a consequence, forfeited his right, is an inquiry of a different character. Neither our constitution nor our law has conferred upon the judges of elections any such judicial functions. They are not sworn to try issues in criminal cases. They have no power to compel the attendance of witnesses, and their judgment, if rendered, would be binding upon no other tribunal. Even if they were to assume jurisdiction of the offence described in the act of Congress, and proceed to try whether the applicant for a vote had been duly enrolled and drafted, whether he had received notice of the draft, whether he had deserted and failed to return to service or failed to report to a provost-marshal, and whether he had justifying reasons for such failure, and if after such trial they were to decide that he had not forfeited his citizenship, all this would not amount to an acquittal. It would not protect him against a subsequent similar accusation and trial, would not protect him against trial and punishment by a court martial. Surely that is no trial by due process of law, the

judgment in which is not final, decides nothing, but leaves the accused exposed to another trial in a different tribunal, and to the imposition by that other tribunal of the full punishment prescribed by law."

The decision of the state board of registration that an old practitioner was not legally registered under the law of 1883, would be in effect an adjudication that he had been guilty of an unlawful or criminal act and was liable to the penalty prescribed for such act, namely, inability to collect by suit for his services, and that he was liable to fine and imprisonment if, in addition to practicing without legal registration, he had advertised or held himself out as authorized to practice. If, as the Supreme Court of Pennsylvania says, due process of law in such cases "ordinarily implies and includes a complainant, a defendant and a judge, regular allegations, opportunity to answer, and a trial according to some settled course of judicial proceeding," then certainly such a decision would not be reached after due process of law, for there would be no complainant, no defendant against whom regular allegations are made, and consequently no opportunity to answer them, no trial according to any settled course of judicial proceeding, no trial or hearing whatever except such as might be voluntarily vouchsafed by this administrative board without judicial rules or procedure of any sort. Instead of these safeguards everywhere provided for the rights of those charged with the commission of unlawful acts, the person must within a certain time present sufficient proofs of his own innocence. After presenting such proofs, he is still liable to secret accusation and condemnation by the board, without any hearing and without even notice. Every one of the thousands of medical practitioners within the state who would be affected by the provisions of subdivision 1 of section 3 of the law of 1899, must affirmatively prove that he has not been engaged in the practice of medicine as a lawbreaker. The board of registration might lawfully inquire and determine as to certain facts relating to an applicant's qualifications. It might determine whether

he was twenty-one years of age and of good moral character, and whether he had certain professional skill and learning. But when it is called upon by the statute to determine what is upon its face a legal question and a question involving directly the applicant's guilt or innocence of an unlawful act punishable by certain penalties, such a board of registration is given powers which cannot be performed by it without the safeguards which constitute due process of law. In the language of the Pennsylvania Court, the state board of registration has "no power to compel the attendance of witnesses, and its judgment, if rendered, would be binding upon no other tribunal." If it were to assume jurisdiction and proceed to try whether an old practitioner had been practicing without legal registration, and whether the affidavit filed with the county clerk was sufficient in form and substance, whether the facts stated therein were true, whether the college of which the applicant was a graduate had been legally authorized to do business, and if after such trial the board were to decide that the applicant had not practiced without legal registration, all this would not amount to an acquittal of the charge of so practicing, and would not protect him against a subsequent preferment of the same charge and the infliction of the prescribed penalties. The applicant is required to present to the board his proofs upon the question of the legality of his registration, which is the only and decisive question in determining whether he has been guilty of practicing unlawfully, and which would undoubtedly be in most cases the only and decisive question in determining whether he has been guilty of advertising or holding himself out to the public as authorized to practice medicine when not so authorized. After presenting his proofs upon this question, even though his registration be declared legal by the board, he is not protected from future prosecutions for the unlawful and criminal acts denounced in the law of 1883. In the language of the Pennsylvania court, "surely that is no trial by due process of law, the judgment of which is not final, decides nothing, but leaves the accused exposed to another trial in a

different tribunal and to the imposition by that other tribunal of the full punishment prescribed by law."

The disinclination of courts of last resort to uphold convictions in cases where guilt depends upon the arbitrary decision of administrative boards, is further illustrated by the decision of the California Supreme Court in Ex parte McNulty, 77 Cal., 164. The state medical law provided that the board of examiners might revoke the certifiate of a medical practitioner for unprofessional conduct. McNulty was registered by the board, and his certificate was afterwards revoked for alleged unprofessional conduct in advertising himself as a specialist in certain diseases. He continued to practice and was convicted of practicing unlawfully. The statute provided, "Any person practicing medicine or surgery in this state without first having procured a certificate so to do from one of the boards of examiners appointed by one of the societies mentioned in section 2 of this act shall be guilty of a misdemeanor."

The court says, page 168:

"Nothing is declared in this act to be a crime except practicing 'without first having procured a certificate.' practicing after an order of the board revoking the certificate for unprofessional conduct, is not declared to be a crime and no penalty is attached to it. Respondent's position really is that the legislature must have intended such conduct to be a criminal offense. It would be vain to inquire what intent lurked in the minds of the persons who happened to be members of the legislature when the act was passed. It certainly would be a forced thing to imagine their intent to be that *a man should lose his liberty for the violation of any vague, undefined notion of unprofessional conduct which might, after the fact, be entertained by certain individuals constituting a board of examiners.*"

If the plain language of the Michigan legislature of 1899 did not compel us to reach that conclusion, it would be "a forced thing to imagine their intent to be that a man should lose his liberty for the violation of any vague, undefined notion" which certain individuals constituting the board of registration might entertain as to the legality of a physician's registration made years before, for which opinion on

the part of the board no reasons are assigned, and from which decision there is no appeal to any higher tribunal. Although in the case last cited the conviction was set aside on the ground that the statute did not have any such meaning, two of the members of the court, in giving concurring opinions, express in very strong language their conviction that the legislature had no authority to confer such powers upon a body like the state board of medical examiners.

II.

Can Rights in a Profession be made Subject to the Conditions named in the Law of 1899?

The method of exclusion of medical practitioners from the further practice of medicine adopted by the law of 1899, even though it is only a qualified or conditional exclusion, makes said law, so far as these persons are concerned, both a bill of attainder and an *ex post facto* law. In Ex parte Garland, 4 Wall., 333, 377, in giving the opinion of the court, Mr. Justice Field says:

"And exclusion from any of the professions or any of the ordinary avocations of life for past conduct, can be regarded in no other light than as punishment for such conduct. The exaction of the oath is the mode provided for ascertaining the parties upon whom the act is intended to operate, and instead of lessening, increases its objectionable character. All enactments of this kind partake of the nature of bills of pains and penalties, and are subject to the constitutional inhibition against the passage of bills of attainder, under which general designation they are included. In the exclusion which the statute adjudges it imposes a punishment for some of the acts specified which were not punishable at the time they were committed; and for other of the acts it adds a new punishment to that before prescribed, and it is thus brought within the further inhibition of the constitution against the passage of an *ex post facto* law."

In effect, the medical practitioner who was practicing in Michigan prior to the law of 1899, is excluded, with certain qualifications and conditions, from the further practice of his profession unless he shall prove himself not to have been guilty of a certain unlawful act in the past. Although he is

not required to make this proof by means of an oath, as in the case of Garland, the principle is the same. The punishment of offenses by legislative fiat, leaving those affected to prove themselves innocent by oath or otherwise, cannot be considered as anything other than the enactment of a bill of attainder, and if a new penalty is imposed for acts already committed, the law must be considered an *ex post facto* law. If a physician was guilty of practicing without legal registration prior to the passage of the law of 1899, the statute of 1883 provided penalties for such offense. The act of 1899 could not lawfully add to those penalties, as it presumes to do, by making the right to continue in practice dependent, under certain conditions, upon freedom from past transgressions of the law of 1883.

In Cummings vs. Missouri, 4 Wall., 277, 321, a case, without doubt, familiar to every member of this court, it was held that certain clauses of the constitution of Missouri were in conflict with the Constitution of the United States, and were of the nature of bills of attainder and *ex post facto* laws. These clauses required all persons to deny by oath certain acts of actual or presumed disloyalty, before they could engage in the calling of priests or teachers or in certain other professions. In that case, this court, speaking by Mr. Justice Field, says:

"The theory upon which our political institutions rest is, that all men have certain inalienable rights; that among these are life, liberty and the pursuit of happiness; that in the pursuit of happiness all avocations, all honors, all positions, are alike open to everyone, and that in the protection of these rights all are equal before the law. Any deprivation *or suspension* of any of these rights for past conduct *is punishment*, and can be in no other wise defined."

The court further says, page 323:

"A bill of attainder is a legislative act which inflicts punishment without a judicial trial."

After showing that bills of attainder, though generally directed against individuals by name, may be directed against a whole class, and may inflict punishment absolutely or conditionally, the court reaches the conclusion that if the con-

stitution of Missouri had declared that all priests and clergymen within the state were guilty of certain acts, or should be held guilty of them, and should be deprived of the right to preach as priests or teach in any institution of learning, provided they did not by a designated day do certain specified acts, such a constitutional provision would be within the inhibition of the federal constitution no less than if it had designated by name the persons upon whom these penalties were to be inflicted.

The court then continues, page 325:

"The results which would follow from clauses of the character mentioned do follow from the clauses actually adopted. The difference between the last case supposed and the case actually presented is one of form only, and not of substance. The existing clauses presume the guilt of the priests and clergymen, and adjudge the deprivation of their right to preach or teach unless the presumption be first removed by their expurgatory oath—in other words, they assume the guilt and adjudge the punishment conditionally. The clauses supposed differ only in that they declare the guilt instead of assuming it. The deprivation is effected with equal certainty in the one case as it would be in the other, but not with equal directness. The purpose of the law-maker in the case supposed would be openly avowed; in the case existing it is only disguised. The legal result must be the same, for what cannot be done directly cannot be done indirectly. The constitution deals with substance, not shadows. Its inhibition was leveled at the thing, not the name. It intended that the rights of the citizen should be secure against deprivation for past conduct by legislative enactment, under any form, however disguised. If the inhibition can be evaded by the form of the enactment, its insertion in the fundamental law was a vain and futile proceeding."

This strong and forcible language may be applied with equal logic and consistency to the present case. The right of every medical practitioner in the state of Michigan prior to the passage of the law of 1899 is suspended, and is conditionally taken away permanently unless he shall within a certain time prove himself not to have been guilty of certain unlawful acts in the past. The law "presumes the guilt" of the physicians and "adjudges the deprivation of their

right" to practice "unless the presumption be first removed," not by their "expurgatory oath," but by "sufficient proof."

In the case last cited, the court says, page 325:

"By an *ex post facto* law is meant one which imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed; or changes the rules of evidence by which less or different testimony is sufficient to convict than was then required."

We think it cannot be disputed that the act of 1899 imposed a new and additional penalty for unlawful acts committed prior to its passage. In the language of Mr. Justice Field in Cummings vs. Missouri, page 322:

"The theory upon which our political institutions rest is, that all men have certain inalienable rights—that among these are life, liberty and the pursuit of happiness; that in the pursuit of happiness all avocations, all honors, all positions are alike open to everyone; and that in the protection of these rights all are equal before the law. *Any deprivation or suspension of these rights for past conduct is punishment, and can be in no other wise defined.*"

The law of 1899 is an *ex post facto* law also by reason of the fact that it changes the rules of evidence so that less or different evidence is sufficient to convict than was formerly required. With reference to the provisions in the constitution of Missouri, the court, in Cummings vs. Missouri, says, page 328:

"The clauses in question subvert the presumptions of innocence, and alter the rules of evidence, which heretofore, under the universally recognized principles of the common law, have been supposed to be fundamental and unchangeable. They assume that the parties are guilty; they call upon the parties to establish their innocence; and they declare that such innocence can be shown only in one way—by an inquisition, in the form of an expurgatory oath, into the consciences of the parties."

In like manner the medical law of 1899 subverts the presumption of innocence and alters the fundamental rules of evidence in requiring applicants to prove themselves by "suffi-

cient proof" not to have been guilty of practicing medicine unlawfully.

III

PRECEDENTS DRAWN FROM CASES INVOLVING MEDICAL STATUTES.

The leading case upon this subject decided by this court, is Dent vs. West Virginia, 129 U. S., 114. By an examination of that case it will appear that the statute of West Virginia therein considered is very different in character from the Michigan statute of 1899. This court has never given its sanction either to the making of a physician's rights conditional upon his proving himself innocent of an unlawful act, nor has it approved the exercise by a state medical board of the power to decide legal questions, without the right of appeal and without granting the right of a hearing and an opportunity to secure needed testimony. In the Dent case it was decided merely that a law may be enforced by a state, requiring that a physician, if he has not practiced ten years within the state, shall be a graduate of a reputable medical college or shall prove his competency to practice medicine by an examination before the state board of health. The plaintiff in error, Dent, had been practicing only six years at the time of the passage of the law, and so was among those subject to the provisions of the statute. It was claimed that he was deprived of his vested rights in the profession without due process of law. The court merely decided that a state can by law prescribe the degree of skill and learning which shall be possessed by medical practitioners, whether they have been engaged in practice for a considerable time or are just beginning practice. The court says (page 123):

"The statute only requires that whoever assumes, by offering to the community his services as a physician, that he possesses such learning and skill, shall present evidence of it by a certificate or license from a body designated by the state as competent to judge of his qualifications."

Action by such a board upon a legal question, without following the forms of law, was not in any manner involved in the case, for the statute contained no such provisions as those to which we object in the Michigan statute.

Another case frequently cited is State, ex rel. Burroughs, vs. Webster, 150 Ind., 607. In that case the relator, Burroughs, applied for mandamus to compel the state board of registration and examination to grant him a certificate entitling him to practice medicine. The only question involved in the case was whether the relator was entitled to the writ of mandamus. The court disposes of this question by saying (page 615):

"The board must act after investigation and then grant or refuse the application as may be found right. *In case of refusal the statute gives the right of appeal. The relator has, therefore, no cause to complain.*"

No other question being before the court, whatever general language may have been used concerning legislation of this kind, was really *obiter dictum*. If, however, the Indiana statute be broadly considered, it will be found to escape the serious objections made to the Michigan statute of 1899. The action of the state medical board was not made final in any case. A physician whose certificate was revoked or to whom a certificate was denied, might appeal to the Circuit or Superior Court of his county, and there he would have his day in court with all the safeguards provided by judicial bodies for the protection of private rights, and with a tribunal competent to pass upon whatever legal questions might arise in the case.

The Indiana law provided that a certificate of the board, after being granted, could be revoked only *after notice and hearing;* and if a license had been issued in pursuance of the certificate, the board could revoke such license only "on the finding and judgment of the court." (Pages 613-14.) The board was directed to issue certificates to persons practicing medicine under the previous law upon presentation of the license held under said law; but the statute also provided: "The state board of medical regis-

tration and examination shall have the right to review the evidence upon which a license has been obtained, and if it shall be found that a license has been obtained by fraud or misrepresentation, the board may revoke such license. The board may refuse to grant a certificate to any person guilty of felony or gross immorality or addicted to the liquor or drug habit to such a degree as to render him unfit to practice medicine or surgery, and may, after notice and hearing, revoke a certificate for like cause." (Pages 612-13.)

It appears that the relator was charged with having procured his license under the previous law by misrepresentation and was also charged with gross immorality. It further appears that the board, on the filing of these charges, "set a date for the hearing and determination of the charges and immediately served a copy of the charges upon the relator with written notice upon him of the time and place of the hearing." (Page 610.)

It will thus be seen that the provisions of the Indiana statute, as well as the practice of the state board acting thereunder, afforded incomparably greater safeguards for the rights of medical practitioners than did the Michigan law of 1899. Under the provisions of the latter law and the practice of the state board, there was no notice whatever of any charges and no opportunity for any hearing.

We have noticed the above cases at considerable length, because they were relied upon in the State Supreme Court and were cited as controlling authorities in the opinion of the court. Legislation regulating the practice of medicine has been passed upon by the courts in many of the other states. Reasonable regulations having for their purpose the securing of sufficient learning and skill on the part of physicians, have been upheld as constitutional. But in no case, we think, has a court upheld provisions similar to those contained in the Michigan statute. No statute has been found containing provisions at all similar to these. In very many of the statutes the right of appeal from the medical board to a court of justice has been expressly granted. In others the

state board is required to give notice of charges or of a contested application, and afford to the applicant opportunity for a hearing before depriving him of any rights. The powers given to state boards in such statutes have had to do with questions of fact, such as the identity of the applicant with the person named in a diploma, the age and good moral character of the applicant, the degree of professional skill and learning possessed by him, the time during which he has practiced medicine within the state, or the good standing and reputable character of the college from which an applicant has been graduated. These questions, under statutes providing for a hearing and an appeal, might properly be passed upon by a medical board after a full and fair hearing of the parties interested.

In conclusion the contention of the plaintiff in error may be summarized as follows:

1. The act of the Michigan legislature of 1899 is in violation of section 1 of the 14th amendment of the federal constitution, in that it confides to an administrative board the decision of a question purely judicial in its nature, without any right of appeal, said board being not only not a judicial body, but not endowed with the powers, nor provided with the procedure, necessary to a body exercising judicial or quasi-judicial functions; said act, while making the rights of the plaintiff in error dependent upon his freedom from criminal acts in the past, yet providing for no hearing and not affording him the ordinary means universally regarded as necessary for the protection of rights.

2. Said act is in violation of subdivision 1 of section 10 of article 1 of the federal constitution, (a) in that it *provides an additional and different penalty for a certain offense* already made punishable by law, and is therefore an *ex post facto* law, and (b) in that it deprives a certain large class of citizens of their rights arbitrarily, unless they shall within a certain time prove themselves innocent of certain criminal or unlawful acts. It thus reverses the rules of evi-

dence by requiring the plaintiff in error to prove his own innocence, and therefore partakes of the nature of a bill of attainder.

The plaintiff in error, therefore, respectfully requests that the judgment of the Supreme Court of the state of Michigan may be set aside and held for naught.

WILLIAM P. BELDEN,
Attorney for Plaintiff in Error.

EDWIN A. BURLINGAME
and JESSE F. ORTON,
of Counsel.

APPENDIX.

Act No. 167 of the Public Acts of the State of Michigan of 1883, as amended by Act No. 268 of the Public Acts of 1887. (Compiled Laws of 1897, Sections 5279 to 5285.)

An Act to Promote Public Health.

(5279) Section 1. The people of the state of Michigan enact, That from and after this act shall take effect, it shall not be lawful for any person to practice medicine or surgery, or any branch thereof (except dentistry) in this state without having the qualifications required in the provisions of this act, and without having first registered in the office of the county clerk as provided in this act.

(5280) Sec. 2. The necessary qualifications to practice medicine in this state shall be:

First. That every person who shall (have) actually practiced medicine continuously for at least five years in this state, and who is practicing when this act shall take effect, shall be deemed qualified to practice medicine in this state, after having registered in the office of the county clerk as provided by this act;

Second. Every graduate of any legally authorized medical college in this state or any (one) of the United States, or in any other country, shall be deemed qualified to practice medicine and surgery in all its departments after having registered as provided in this act; Provided, that the provisions of this act shall not be construed so as to prohibit any student or undergraduate from practicing with and under the immediate supervision of any person legally qualified to practice medicine and surgery under and by the provisions of this act: Provided, that every person qualified to practice medicine and surgery under the provisions of this act shall, within three months after this act shall take effect, file with the county clerk of the county wherein he

has been engaged in practice, or in which he intends to practice, a statement, sworn to before any officer authorized to administer oaths in said county, setting forth, first, if he is actually engaged in practice in said county, the length of time he has been engaged in such continuous practice, and if a graduate of any medical college, the name of the same and where located, when he graduated, and the length of time he attended the same, also the school of medicine to which he belongs. And if he is a student or undergraduate, the length of time he has been engaged in the study of medicine, and where, and if he has attended a medical college, the name of the same and where located, and the length of time so attended and when, also the name and residence of the physician under whose instruction he is practicing or intends to practice. It shall be the duty of the county clerk of each county in this state to record in a book to be provided by the county, the affidavit (or sworn statement) of every physician practicing in said county. For recording each statement the county clerk shall receive fifty cents, to be paid by the person filing the same.

(5281) Sec. 3. It shall be the duty of the supervisor, at the time of making the annual assessment in each year, to make out a list of all the physicians and each student practicing under the instruction of a preceptor residing within his township, village, ward, or city, with the name, age, sex and color of each and the length of time each has been engaged in practice, and if a graduate of a regularly established and reputable college, the name of the college and the date of graduation. Such list shall be returned by the supervisor to the township, village or city clerk, and by the clerk recorded in the book in which are kept the records of the local board of health, and annually, on or before the first day of January, such clerks shall furnish certified lists of the same to the secretary of the state board of health.

(5282) Sec. 4. No person who practices medicine, surgery, or midwifery, in any of their branches (except dentistry), shall be able, in any of the courts of this state, to

collect pay for professional services rendered subsequent to the time that this act shall take effect, unless he was at the time such professional services were rendered, duly qualified and registered as a medical practitioner according to the several provisions of this act.

(5283) Sec. 5. The supervisor, township, village or city clerk is hereby authorized to administer the oaths required by this act.

(5284) Sec. 6. Whoever advertises or holds himself out to the public as authorized to practice medicine or surgery in this state, when in fact he is not so authorized under the provisions of this act, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be liable to a fine of not less than five dollars nor more than fifty dollars for each offense.

(5285) Sec. 7. It shall be the duty of the supervisor and health officer of the local board of health in each township, village, ward, or city, to enforce this act.

Act No. 237 of the Public Acts of the State of Michigan of 1899.

An act to provide for the examination, regulation, licensing and registration of physicians and surgeons, and for the punishment of offenders against this act, and to repeal acts and parts of acts in conflict therewith.

The people of the State of Michigan enact:

Section 1. That the governor shall appoint, by and with the advice and consent of the senate, ten resident electors of the state, who shall constitute a board of registration in medicine. Not more than five of the persons so appointed shall be from the school of medicine known as regular; not more than two of the persons so appointed shall be from the school of medicine known as homeopathic; not more than two of the persons so appointed shall be from the school of medicine known as eclectic; and not more than one of the persons so appointed shall be from the school of medicine

known as physic-medical, and the appointees may be chosen from lists submitted to the governor biennially by each of the four legally incorporated state medical societies of the schools of medicine, as herein mentioned aforesaid, such lists to be certified to under oath of the president or secretary of each society respectively, and filed by them in the office of the secretary of state at Lansing on or before the fifteenth day of September of the present year and on or before the first day of March in each succeeding biennial period. Such lists to contain at least treble the number of names as each society has representatives on the board. But in the event that one or more of the societies above named, through their president or scretaries, shall, from any cause, neglect, omit or refuse to file as aforesaid such list or lists, then and in that case the governor shall appoint or fill the vacancies in said board without reference to such list or lists which the aforesaid society or societies have for any cause neglected, omitted or refused to file with the secretary of state, as herein mentioned aforesaid; but the number of representatives from each of the schools of medicine shall be the same as provided for in this act. All persons so appointed shall be learned in the profession of medicine, shall be graduates of recognized and reputable medical colleges, and shall have been actively engaged in the practice of medicine for at least six years immediately preceding the time of such appointment. The ten persons so appointed shall be appointed in two classes, each class to consist of five persons. The first class shall be appointed to hold office for two years, the second class for four years, beginning with the first day of October of the present year and until their successors are appointed; and thereafter the governor shall appoint, before the first day of October of each biennial period, five persons qualified as aforesaid, in each class to hold office for four years from the first day of October next ensuing. No member of said board shall belong to the faculty of any medical college or university, or shall be financially interested in the manufacture of drugs or the practice of pharmacy. The governor shall

also fill vacancies occasioned by death or otherwise, and may remove any member for the continued neglect of duties required by this act. Vacancies in said board shall be filled in accordance with the provisions of this act for the establishment of the original board, and a person appointed to fill a vacancy shall hold office during the unexpired term of the member whose place he fills. The business of this board shall be transacted by and receive the concurrent vote from at least seven members.

Sec. 2. The members of said board shall meet on the second Tuesday of October, eighteen hundred ninety-nine, at the state capitol at Lansing, and shall then elect a president from their own number, and a secretary who need not be of their number, but each of whom shall hold their respective offices for two years, and shall have the power to administer oaths. Not less than seven members shall constitute a quorum of said board for transaction of business. The secretary shall give to the treasurer of the state a bond in the penal sum of five thousand dollars, with sufficient sureties, to be approved by the governor, for the faithful discharge of his duties. The said board shall hold two regular meetings in each year, beginning with the year eighteen hundred ninety-nine; one on the second Tuesday of October, eighteen hundred ninety-nine, and one on the second Tuesday of June, nineteen hundred, and so on, and such additional meetings at such times and places as it may determine.

Sec. 3. On and after the second Tuesday of October, eighteen hundred ninety-nine, all men and women engaged in the practice of medicine and surgery in any of its branches, and all who wish to begin the same in the state, except as hereinafter provided, shall make application to said board to be registered and for a certificate of such registration. This registration and certificate shall be granted to such applicants as shall give satisfactory proofs of being twenty-one years of age and of good moral character, but only upon compliance with at least one of the following conditions:

1. The applicant shall be registered and given a certificate of registration if he shall present sufficient proof within six months after the passage of this act of his having already been legally registered under Act number one hundred sixty-seven of eighteen hundred eighty-three, as amended in eighteen hundred eighty-seven, entitled "An act to promote public health." The fee for applicants of this class shall be one dollar.

2. The applicant shall be registered and given a certificate of registration if he shall present a certified copy of certificate of registration or license which has been issued to said applicant in any foreign nation where the requirements for registration shall be deemed by said board to be equivalent to those of this act: Provided, such country shall accord a like privilege to holders of certificates from this board. The fee for registration from applicants of this class shall be twenty-five dollars.

3. The applicant shall be registered and given a certificate of registration if he shall satisfactorily pass an examination before the board upon the following subjects: Anatomy, physiology, chemistry, pathology, therapeutics, toxicology, histology, hygiene, public health laws of Michigan, practice of medicine, surgery, obstetrics, gynecology, diseases of the eye and ear, bacteriology and medical jurisprudence; said examination to be conducted as follows:

(a) The applicant shall pay a fee of ten dollars prior to examination.

(b) The examination shall be in writing, oral or both.

(c) The questions on all subjects except in therapeutics and practice of medicine, shall be such as may be answered alike by all schools of medicine.

(d) The applicant shall, if possible, be examined in therapeutics and practice of medicine by those members of the board belonging to the same school as the applicant; and no applicant shall be rejected because of his adherence to any particular system of medicine.

(e) An average percentage of at least seventy-five per cent. of correct answers shall be required from every candi-

date. No additional fee shall be charged by this board for the registration of those who successfully pass such an examination.

4. The applicant shall be registered and given a certificate of registration if he shall present a certified copy of certificate of registration or license which has been issued to said applicant in another state of the Union where the requirements for registration shall be deemed by said board to be equivalent to those of this act: Provided, such state shall accord a like privilege to holders of certificates from this board. The fee for registration from applicants of this class shall be ten dollars.

5. The applicant shall be registered and given a certificate of registration, if he shall have a diploma from any legally incorporated, regularly established and reputable college of medicine in this state, having at least a three years' course of eight months in each year, or a course of four years of six months in each year, or within the United States, except as heretofore provided, as shall be approved and designated by the board of registration, upon payment of ten dollars, and upon complying with all other requirements of this act, such certificates conferring upon the holders of such diploma all the rights and privileges conferred by this act, without examination.

6. The board of registration shall not register any person by reason of a diploma from any college which sells, or advertises to sell diplomas "without attendance," nor from any other than a regularly established and reputable college.

Sec. 4. The person receiving a certificate of registration shall file the same, or a certified copy thereof, with the county clerk in the county where he resides, and said clerk shall file said certificate or the certified copy thereof, and enter a proper memorandum thereof in a book to be provided and kept for that purpose, and may collect therefor a fee of fifty cents for each certificate or copy thus filed. And said county clerk shall, on the first day of each month, furnish to the secretary of said board a list of all certificates filed in his office during the preceding month on a blank

provided for that purpose, and upon notice to him of the change of location or death of a person granted a certificate, or upon the revocation of the certificate granted such person, said county clerk shall enter at the appropriate places in the record so kept by him a memorandum of said facts; so that the record so kept by said county clerk shall correspond with the records of said board, so kept by the secretary thereof. In case a person having thus filed a certificate shall move into another county of the state, he shall procure from said county clerk a certified copy of said certificate, and file the same with the said county clerk of the county to which he shall so remove. Said county clerk shall file and enter the same with like effect, as if the same was the original certificate.

Sec. 5. All moneys received by said board shall be paid to the state treasurer monthly, and shall be credited to the general fund of the state, and a receipt for the same shall be filed by the secretary of the said board in the office of the auditor general. The incidental and traveling expenses of said board, and such salary to the secretary as said board may fix, shall be paid from such fund only. The members of said board, except the secretary, shall receive no compenstion for their services, except necessary traveling and hotel expenses in attending meetings of said board; and in no case shall any more be paid than was actually expended. Such incidental and traveling expenses shall be approved by said board and sent to the auditor general of the state, who shall draw his warrant upon the state treasurer for the amounts due, as in case of other bills and accounts under the provisions of law: Provided, that the amount so paid shall not exceed the amount received by the treasurer of the state from said board in fees, as herein specified, and as much of said receipts as may be necessary is hereby appropriated for the compensation and expenses of said board as aforesaid.

Sec. 6. Said board shall collect from the various county clerks of the state, each month, a report of all registrations made. Said board shall also keep a record of all moneys

received and disbursed by it each month, and said record shall always be open to inspection at the office of the secretary of state. Said board shall annually report to the governor, on or before the first day of January of each year, the condition of medicine and surgery in this state, which report shall contain a full and complete record of all its official acts during the year, and shall also contain a statement of its receipts and disbursements.

Sec. 7. Any person who shall practice medicine or surgery in this state, without first complying with the provisions of this act, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not more than one hundred dollars, or by imprisonment in the county jail for a period of not more than ninety days, or by both such fine and imprisonment, for each offense. It shall be the duty of the respective prosecuting attorneys of the counties of this state to prosecute violations of the provisions of this act, upon information furnished by the records of the county clerk, or a member or members of said registration board, or by any other person entitled to credit.

Sec. 8. This act shall not apply to the commissioned surgeons of the United States army, navy or marine hospital service, in actual performance of their official duties, nor to regularly licensed physicians or surgeons from out of this state, in actual consultation with physicians of this state, nor to dentists in the legitimate practice of their profession, nor to temporary assistants in cases of emergency, nor to the domestic administration of family medicines, nor any legally qualified osteopath engaged in the practice of osteopathy under the provisions of act number seventy-eight of the public acts of the State of Michigan of eighteen hundred ninety-seven, regulating and licensing the practice of osteopathy in the State of Michigan.

Sec. 9. When any person shall append the letters M. B. or M. D., or prefix the title "Dr." or doctor or any other sign or appellation in a medical sense to his name, it shall be *prima facie* evidence of practicing medicine and surgery within the meaning of this act.

Sec. 10. It shall be the duty of the assessing officer at the time of making the annual assessment to make out a list of physicians residing within his township, village, district, ward or city, with the name, age and sex of each, and the length of time each has been engaged in practice. Such list shall be returned by the assessing officer to the county clerk, and by the clerk recorded in a book in which are kept the records of the board, and annually on or before the first day of January, such clerks shall furnish certified lists of the same to the secretary of this board.

Sec. 11. An act entitled "An act to promote public health," approved June sixth, eighteen hundred eighty-three, and the act amendatory thereto, approved June twenty-seventh, eighteen hundred eighty-seven, except as to all penalties which shall have accrued thereunder, are hereby repealed.

Approved June 13, 1899.